vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO.691 OF 2005**
IN
SUIT NO.473 OF 2005

Shailaja Shantaram Wagle & Ors. ... Plaintiffs

V/s.

Shardaben Chandulal Shah & Ors. ... Defendants

a/w
**CHAMBER SUMMONS NO.1595 OF 2005**
IN
EXECUTION APPLICATION (L) NO.532 OF 2005
IN
SUIT NO.922 OF 1980

Shardaben C. Shah & Ors. ... Plaintiffs

V/s.

Sarojini G. Wagh ... Defendant

Mr.S.B. Prabhavalkar for Plaintiff in Suit No.473 of 2005 and Defendant in Suit No.922 of 1980

Mr.M.L. Palan for Defendant in Suit No.473 of 2005 and for Plaintiff in Suit No.922 of 1980

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **JULY 18, 2006**

**P.C.:**

. The Plaintiffs have filed the present suit No.473 of 2005 for a declaration that the ex-parte decree dated 4.3.2002 passed in Suit No.922 of 1980 is not binding on the plaintiffs. A declaration is also sought that the plaintiffs are entitled to 1/4th share each of the said property being Survey No.H/86, Final Plot No.23, TPS-I, admeasuring 885 sq.yards equivalent to 739.948 sq.metres together with dwelling house

standing thereon known as Wagh Bungalow at Besant Street, Santacruz (West), Mumbai-400 054. A permanent injunction is also sought against the defendants from executing the ex-parte decree. For the sake of brevity, the Plaintiffs in Suit No.473 of 2005 are hereinafter referred to as "the Plaintiffs" and the Defendants in Suit No.473 of 2005, who are the Plaintiffs in Suit No.922 of 1980 are referred to as "the Defendants".

2. The Plaintiffs are the daughters of one Gangadhar Bhalchandra Wagh and Sarojini Gangadhar Wagh. Gangadhar and Sarojini alongwith the brothers of Gangadhar Bhalchandra Wagh agreed to sell the suit property to the Defendants. This agreement was executed in February 1973. The Plaintiffs contend that Suit No.341 of 1980 was filed by the vendors i.e., their parents, the brothers of Gangadhar and their respective wives. It appears that the plaintiffs in that suit did not obtain any interim relief. They had sought cancellation of the agreement of sale.

3. Since the plaintiffs in that suit refused to execute the agreement and specifically perform the same, the defendants herein, filed Suit No.922 of 1980. That suit was decreed on 4.3.2002 whereas Suit No.341 of 1980 was dismissed on 3.5.2000. The Defendants' suit was decreed although all except Sarojini, the mother of the present plaintiffs had died and the heirs of the deceased defendants were not brought on record. Thus,

an ex-parte decree came to be passed on 4.3.2002.

4. Sarojini filed a Motion for setting aside that ex-parte decree. Another Motion was also filed for restoration of Suit No.341 of 1980. Both these Motions were dismissed by this Court on 21.2.2003. Appeals have been filed against the order.

5. After the decree was obtained, the defendants sought to execute the same. A Chamber Summons has been taken out being Chamber Summons No.1595 of 2005. By this Chamber Summons, a direction is sought to the Prothonotary and Senior Master to execute the conveyance in favour of the plaintiffs as per the decree dated 4.3.2002 and to get the same registered.

6. According to the learned Advocate for the Plaintiffs, Plaintiff No.3 has a right in the suit property in her individual capacity being a member of the joint family. Plaintiff No.3 was unmarried when the agreement for sale was executed in 1973. Therefore,submits the learned Counsel for the plaintiffs, that she is entitled to the suit property and an order as prayed for in the suit. The plaintiffs being the daughters of Gangadhar and Sarojini who were two of the six vendors of the suit property are entitled to the property as heirs of Gangadhar. They are also entitled to the suit property as heirs of their uncles and aunts, the other vendors who died issueless. A

submission is made that the defendants herein ought to have brought on record the plaintiffs herein in suit No.922 of 1980 on the death of all the defendants in that suit except Sarojini. It is submitted that not having done so, the decree cannot be executed as the plaintiffs would have a right in the suit property.

7. Admittedly, the plaintiffs' mother Sarojini had filed a notice of Motion to have the decree set aside and to restore the suit filed by the defendants. The plaintiffs did not bother to exercise their right when their mother had opted to file applications for restoration of the suit. Only after these applications were dismissed, the plaintiffs have filed the present suit.

8. Under Order 22 Rule 4 (4) of the Civil Procedure Code, it is open to the Court to exempt a plaintiff from the necessity of substituting the legal representatives of any defendant who fails to file a written statement. In the present case, admittedly the written statement was not filed by the deceased father of the plaintiffs herein and/or the other defendants in suit No.922 of 1980. Mr.Prabhawalkar, appearing for the Plaintiffs, contends that these provisions of the Civil Procedure Code do not apply to the facts in the present case as unless a party applies to the Court and is granted an exemption from adding legal representatives of the deceased Defendants as party to the suit, it is

necessary for the legal representatives to be arrayed as party Defendants.

9. This argument cannot be accepted. The plaintiffs' father died in 1993. The plaintiffs and their mother Sarojini took no action at all to inform the defendants herein about the death of the father or the their uncles and aunts. In such circumstances, I see no reason to grant any interim relief in favour of the plaintiffs.

10. As regards the prayers in the Chamber Summons No.1595 of 2005, it is submitted on behalf of the plaintiffs in Suit No.473 of 2005 that under Order 21 Rule 22 it is necessary that notices be issued as the application for execution is made after two years from the date of the decree. These Plaintiffs have no right to a notice as they are not Defendants to Suit NO.922 of 1980. Sarojini is also not entitled to a notice in view of the proviso to Order 21 Rule 22 which reads as follows:

> Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application

for execution, or in cosnequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

11. Admittedly, the decree is dated 4.3.2002. The last order against Sarojini was passed on 21.2.2003 in Notice of Motion No.1759 of 2002. In my opinion, the submissions made on behalf of the plaintiffs cannot be accepted. Notice of Motion is dismissed. It is an obvious attempt on the part of the Plaintiffs to stake a claim to the suit property only after Sarojini, their mother, failed in getting the decree set aside. The Chamber Summons is made absolute in terms of prayer clauses (a) and (b).

12. The learned Advocate for the Plaintiffs seeks a stay of this order for a period of three weeks. Stay granted for three weeks.